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QUARTERLY JOURNAL OF THE JEFFERSON SOCIETY, INC.

Monticello

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Our Mission

The Jefferson Society, Inc. is a non-profit corporation, founded on July 4, 2012 for the advancement of its members' mutual interests in Architecture and Law. The Society intends to accomplish these purposes by enhancing collegiality among its members and by facilitating dialogue between architects and lawyers.

Know of Another Architect-Lawyer Who Has Not Yet Joined?

Send his or her name to TJS President Suzanne Harness sharness@harnessprojects.com and we will reach out to them. Candidates must have dual degrees in architecture and law.

AUTHORS WANTED

Interested in writing an article, a member profile, an opinion piece, or highlighting some new case or statute that is of interest? Please e-mail Bill Quatman to submit your idea for an upcoming issue of Monticello. Contact: bquatman@burnsmcd.com

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WEBSITE:

www.thejeffersonsociety.org

PRESIDENT'S MESSAGE:

By Suzanne Harness, AIA, Esq.
Harness Law, PLLC

The fall is always such a busy season, with schools back in session, football, and MLB playoffs, but this fall also hit us with some pretty bad weather. I hope all reading this are doing well and did not suffer any loss or injury in the recent storms. On top of that, there's the level of work that seems to be going up for everyone in the design profession and construction industry. I also hope that all of you are busy working, but not too busy to read this newsletter, which is packed with case briefs of interest to all of us, a memorial to the late, great Carl Sapers, Hon. AIA, Esq., and mini-treatises by our editor Bill Quatman, FAIA, Esq. on the doctrines of superior knowledge and cardinal changes. Don't miss the update on page 3 about our Director, Rebecca McWilliams, AIA, Esq. who won her primary election on the way to serving in New Hampshire's state legislature! Congratulations, Rebecca!

On Oct. 15, the Board of Directors held a conference call to assess where we stand on several of our initiatives, but first we welcomed two new members to the Board: Mark Ryan, AIA, Esq. who runs his own practice, Ryan Patents, in Las Vegas, and Joshua Flowers, FAIA, Esq. who is General Counsel of HBG Design in Memphis. We are delighted to welcome them to the Board, and more than thrilled that each of them has hit the ground running by offering up their skills to further the goals of the Society. Since Mark lives in Las Vegas, he has graciously volunteered to take the lead on organizing our Annual Meeting and Election of Officers on June 5, 2019, which we will hold in Las Vegas to coincide with the AIA Conference on Architecture. Josh, who is also the incoming president of AIA Tennessee, has served on peer review committees for education programs at the AIA's annual conference and he is giving us pointers about writing a winning proposal for future AIA Conference submissions.

(Continued on page 2)

The Jefferson Society, Inc.
c/o 2170 Lonicera Way
Charlottesville, VA 22911

(President's Message Cont'd from page 1)

Part of the Society's mission (check it out on our web site) is to serve as a resource for architects, attorneys, and the public on the legal aspects of the practice of architecture. For that reason, we are once again hard at work on a proposal to present a half-day Workshop at the AIA Conference on Architecture, set for June 6-8, 2019 in Las Vegas, NV. Founder and Director Chuck Heuer, FAIA, Esq. is busily preparing our submission with myself, President-Elect Donna Hunt, AIA, Esq. and Founder Craig Williams, FAIA, Esq., assisting as presenters. We think that competition is stiff, so cross your fingers that our program will be accepted.

Members Jessyca Henderson, Washington, DC, and Jessica Hardy Dallas TX, have already starting putting together another group of our members to present for admission to the United States Supreme Court. We hope to have more details about that over the next month. Our last swearing-in event in the fall of 2017 was wildly successful. If you missed it, and don't want to be left out the next time, so stay tuned for more information coming soon!

Over the next several months we also hope to take steps to make running our organization take a little less volunteer time, and make life easier for all members as well, by automating our dues paying process. Online payment is in our future, and we hope to have it in place for the payment of 2019 dues.

As always, let us know if you are speaking at an event or were recently published. We will be delighted to publicize your news. And, we are always seeking authors. If you have an article written, or would like to write one for publication here in *Monticello*, send a note to our editor Bill Quatman, whose address is: bquatman@burnsmcd.com.

The Superior Knowledge Doctrine

G. William Quatman
Burns & McDonnell
Kansas City, MO

The Doctrine in General.

It is well established in government construction cases that "the contractor in a fixed - price contract assumes the risk of unexpected costs." *RDA Construction Corp. v. U.S.,* 132 Fed.Cl. 732, 767 (2017). Under normal circumstances, "Where the Government ... has no duty to disclose information, and does not improperly interfere with performance, the fixed-price contractor of course bears the burden of unanticipated increases in cost." *Helene Curtis Indus., Inc. v. U.S.,* 312 F.2d 774, 778 (Ct. Cl. 1963).

However, under a rule of law known as the Superior Knowledge Doctrine, the government has "an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Giesler v. U.S.,* 232 F.3d 864, 876 (Fed. Cir. 2000). The doctrine developed out of the well-known Court of Claims' decision in *Helene Curtis*, supra, where it was noted: "Although it is not a fiduciary toward its contractors, the government, where the balance of knowledge is so clearly on its side, can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word." *Helene Curtis,* at 778.

This superior knowledge doctrine is generally applied to situations where: 1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; 2) the government was aware that the contractor had no knowledge of, and had no reason to obtain, such information; 3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and, 4) the government failed to provide the relevant information. Several state courts have adopted this doctrine. A 2010 California case held that the superior knowledge doctrine requires the public entity to have been aware it possessed material information unknown to the contractor, "but does not require that the entity have an affirmative intent to deceive." *Los Angeles Unif. School Dist. v. Great American Ins. Co.,* 234 P.3d 490, 497 (Cal. 2010). Indiana has also adopted the superior knowledge doctrine in practice, but not by that name. *Indiana Dept. Of Transp. v. Shelly & Sands, Inc.,* 756 N.E.2d 1063, 1075 (Ind. App. 2001).

Top Secret Information.

What if the government's project involves national security or classified information that it withholds from the contractor? Does the doctrine still apply? At least one case held that it does not. In *McDonnell Douglas Corp. v. U.S.,* 323 F.3d 1006 (Fed. Cir. 2003) the U.S. Navy awarded a $4.7 billion contract to research and develop a "stealth" attack aircraft (the "A–12 Avenger") that could land on an aircraft carrier. The contract called for the contractors to design and build eight such stealth aircraft according to a specified delivery schedule. From the outset, the contractors encountered difficulties in meeting the contract schedule. After multiple delays, the Navy terminated the contract for default and demanded the return of $1.35 billion in progress payments under the terminated contract.

The contractors asserted a duty to disclose alleged superior knowledge despite the assertion of the state secrets privilege. The government countered that the duty to disclose superior knowledge did not apply if the information involved is classified. The Court of Federal Claims ruled that the contractors could not proceed with that defense, because litigation of that claim would require extensive discovery into classified military information regarding top secret aircraft. After a dozen years of litigation, the Federal Circuit Court of Appeals affirmed that ruling, holding that: "The Military and State Secrets privilege allows the United States to block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security."

AIA Adopts Amended Code of Ethics

As reported in the July 2018 issue of *Monticello*, the AIA Board of Directors was asked to adopt a resolution passed at the 2018 AIA Convention that amended the Code of Ethics. On Sept. 11, 2018, the AIA Board approved several changes to the **AIA Code of Ethics and Professional Conduct** to explicitly address sexual harassment, equity in the profession, and sustainability. "The architecture profession is at a threshold moment," said AIA 2018 President Carl Elefante, FAIA. "The Board's adoption of these changes provides us with another step toward ending sexual harassment in the workplace, advancing equity in our profession, and promulgating sustainable practices. I applaud the members who raised their voices to offer these improvements to the code, and the AIA delegates, Board of Directors, and National Ethics Council who acted on their concerns." To read the updated Code, go to www.aia.org

Campaign Update: TJS Member Rebecca McWilliams Easily Wins Primary!

"Mother, Farmer & Business Woman for Merrimack 27 NH State Rep." That is her campaign slogan. A farmer who is also an architect is set to become New Hampshire's newest state representative. Democrat Rebecca McWilliams easily carried the primary in September. Rebecca, the co-owner of Lewis Farm and owner of McWilliams Law in Concord, took nearly half of the 4,620 votes cast in the primary. Because there are no Republican candidates, she has all-but secured District 27, which covers Wards 1-4 and Ward 6 in Concord.

TJS Member Rebecca is involved locally, serving on the Transportation Authority Committee. She received her juris doctor from Suffolk Law in Boston, and worked as a Director of Policy for State Rep. Chris Walsh during that time. She is currently working with the state's Dept. of Environmental Services to draft compost enabling legislation to allow farms across the state to accept meat and dairy to their compost operations, according to her campaign page.

"Thanks to everyone who pitched in to make this possible, it truly was a team win," McWilliams wrote on her campaign Facebook page. "I am looking forward to taking some time to relax, and catch up on client work, and then do my due diligence for the 2019 legislative session." We will soon be proud to call her Representative McWilliams!

Connecticut: Architect Who Was Fired Is Found Not Negligent; Awarded Damages For Owner's Breach!

A homeowner sued his architect and construction contractor, alleging breach of contract to renovate a home in Greenwich. The property consisted of an approximately four acre lot that, in addition to a split-level home, features an outdoor swimming pool, a pond, a barn, and a tennis court. At the initial meeting, the plaintiff conveyed to the architect his desire to contain the overall cost of the project, indicating that, in designing and quoting the project, the architect should contemplate using only the highest quality materials and labor in order to help guard against the possibility of the project later running over budget. He believed that by getting quotes for high end materials and workmanship, any subsequent changes that occurred likely would involve a reduction, rather than an increase, in the overall price of the project. The architect submitted a proposal for preparing a schematic design and for outline specifications to use for bidding, followed by a lump sum fee for preparing complete drawings and negotiating and administrating construction contracts. The parties signed the proposal, which all parties agreed constitutes the entirety of the architectural contract.

The homeowner approved the schematic design, but wanted additional information regarding potential construction costs. The owner rejected the initial bid for the renovations, calling it too high. He then authorized the architect to complete a more detailed set of structural drawings and specifications for the residence in order to solicit additional construction bids. The next set of bids ranged from $1.2 million to over $1.5 million. The owner was again unhappy and wanted the overall cost of the project reduced significantly, closer to $600,000. The architect prepared a list of possible changes that could help to reduce costs. After incorporating the changes approved by the owner, the architect obtained new bids. The chosen contractor's bid was between $860,000 and $912,000. The owner ultimately signed an AIA construction contract for $921,557, supplemented by addendum for a stone wall costing $229,986 more. After several disputes, however, the architect was fired from the project before completion. The owner did not hire a new architect and more disputes arose between with the contractor. Upon completion, the homeowner sued both the architect and contractor for damages.

With respect to the architect, count one alleged multiple breaches of contract. Count two alleged breach of an express warranty that guaranteed that the architect was qualified to perform the services undertaken in the architectural contract and that it would do so with the care, diligence, and skill exercised by professional architects. Count three sounded in professional negligence. The architect denied any liability and filed a breach of contract counterclaim against the plaintiff seeking unpaid invoices totaling $132,996 and release of an additional $85,614 being held in retainer. The trial court sided with the architect but awarded damages of just $3,992. The court also ruled for the contractor, awarding damages of $132,966 plus pre-judgment interest of $24,092, as well as retainage of $77,163. The homeowner appealed.

While very fact-specific, the Court of Appeals affirmed. As to the negligence claim, the Court held that in order to prevail on a claim of professional negligence or malpractice, a plaintiff has the burden to show the following: "(1) a duty to conform to a professional standard of care for the plaintiff's protection; (2) a deviation from that standard of care; (3) injury; and (4) a causal connection between the deviation and the claimed injury." The Court added that ordinarily, whether a professional's conduct met the required standard of care or deviated from that standard are questions of fact to be decided by the trier of fact. The plaintiff called an expert witness who testified that the architect breached the standard of care several ways. However, the architect's expert contradicted this testimony. Accordingly, the evidence before the court regarding professional responsibilities under the contract was conflicting. "As the trier of fact, the court had the authority to resolve this conflict as it saw fit," the Court of Appeals ruled, adding: "it is outside the role of this court to second-guess the credibility determinations of the trier of fact." The judgment was affirmed. See, *Abrams v. PH Architects, LLC*, 2018 WL 3617251 (Conn. App. 2018).

Lots of Changes in Standard Form Contracts

The ABA Forum on Construction Law announced these recent, and upcoming, changes to industry contract forms.

AIA. In Fall 2018, AIA Contract Documents will release several new documents, along with updates of existing documents. New in 2018 are A421™–2018, a master agreement between the contractor and subcontractor (intended for use where the parties anticipate several scopes of work to be established with work orders) and A422™–2018, the work order for use with the master agreement. These documents round out the AIA's master agreement and work or service order offerings. In addition, the AIA has updated the A701 Instructions to Bidders document, C101 Joint Venture Agreement for Professional Services, C402 (formerly C727) Agreement between Architect and Consultant for Special Services, G709 Proposal Request (to obtain quotes for change order work), and G711 Architect Field Report. In 2017, the AIA transitioned to a new web-based content delivery platform for AIA Contract Documents and discontinued the desktop-based platform. The web-based platform allows for 24/7/365 access to documents from anywhere when you connect to an internet browser.

EJCDC. The EJCDC will release the 2018 Construction Series documents this fall. The Construction Series offers documents for use on traditional projects where the Owner retains the Engineer to provide the design services, and then separately contracts with a Contractor for construction. Examples of the 25 new or revised documents to be released include instructions to bidders, Owner-Contractor agreement forms, standard general conditions, and supplementary conditions. Offerings include an all new warranty bond form (C-612). The Stipulated Price (C-520) and Cost Plus Fee (C-525) agreement forms contain further refined damage provisions relative to Liquidated and Special Damages. These forms also provide for the identity of an Owner's representative different from the Engineer of Record; The Supplementary Conditions (C-800) have been renamed "Supplementary Conditions of the Construction Contract."

ConsensusDOCS. In Sept. 2018, the ConsensusDOCS Coalition published the Lean Construction Addendum. The Consensus DOCS 305 utilizes lean tools and processes without an Integrated Project Delivery (IPD) Agreement. The Lean Addendum provides a contractual mechanism to take advantage of lean construction efficiencies and memorialize a more collaborative construction approach. Also in Sept. 2018, ConsensusDOCS published the Consensus DOCS 541 Design Assist Agreement, which helps define the range of design-assist services that the parties can choose to use, and helps create the collaborative structure among an owner, design professional and constructor that is necessary to make design-assist effective.

DBIA. Recently, the DBIA published new standard form Request for Qualifications and Request for Proposals (RPQ/RFP) plus an accompanying Guide. Also, DBIA's Contracts Committee is currently preparing a standard form Progressive Design-Build (PDB) contract to accompany DBIA's recent PDB form for water and wastewater projects. PDB is one application of design-build delivery that uses a qualifications-based or best-value selection followed by a process whereby the owner then "progresses" toward a design and contract price with the team. Also in the works is an addendum to the Owner/Design-Builder Agreement for Design-Build-Operate-Maintain (DBOM). The DBIA Committee also is working on updating its core forms with updated versions planned for publication in 2019.

TJS Membership Count is at 110 !

After dropping below 100 members one year ago, TJS has recruited several new members and now tops the 100 mark.
Welcome our 3 new members:

Donald Barry, AIA, Esq.
A3C Collaborative Architecture
Ann Arbor, MI

Justin Monahan, Esq.
Otak, Inc.
Portland, OR

Kelly Saunders, AIA, Esq.
Kamm Architecture
Washington, D.C.

Attention Delinquent Dues Payers!
Yes, you know who you are.
***And so do we*!**

If you have not paid your 2017 or 2018 dues, please write your check for $50 for each year to "The Jefferson Society, Inc." and mail it to our Treasurer:
Jose Rodriguez, AIA, Esq.
490 Sawgrass Corp Pkwy
Suite 320
Ft. Lauderdale, FL 33325

If you have already paid your dues, "Thank You"!

Virginia: Indemnity Clause Void in Architect's Contract

In this case, an architectural firm sued another architectural firm, a builder, and others for copyright infringement with respect to plans for a condo project in Minneapolis. The builder tendered its defense to the architect based on an indemnity clause in the architect's contract with the project owner. When the architect balked at the defense demand, the builder's CGL insurer (Travelers) defended the builder. In the underlying case, the plaintiff was awarded attorneys' fees against the builder in the amount of $792,796, which the parties settled for $745,000. Travelers paid the fees and then sued the architect in an action for subrogation for those fees and defense costs.

The architectural firm filed a motion for judgment on the pleadings, denying a duty to indemnify for these costs. The trial court granted that motion, holding that the indemnification clause in the architect's contract was void under Virginia law.

Section 2.7 of the architect's contract said it would: "indemnify, defend and hold the Owner, Owner's Developer, and Owner's Developer's wholly owned affiliates and the agents, employees and officers of any of them harmless from and against any and all losses, liabilities, expenses, claims, fines and penalties, costs and expenses, including, but not limited to reasonable attorneys' fees and court costs relating to the services performed by the Architect hereunder."

The key to the case is a Virginia statute, Va. Code § 11–4.1, which invalidates indemnification provisions "by which [a] contractor performing" work on "any contract relating to construction" is required to indemnify other parties to the contract for negligence relating to the performance of the contract. Thus, the statute invalidates an indemnification provision if:

(i) the contract containing the indemnification provision is a "contract relating to construction[,]"

(ii) the indemnifying party is a "contractor[,]" and

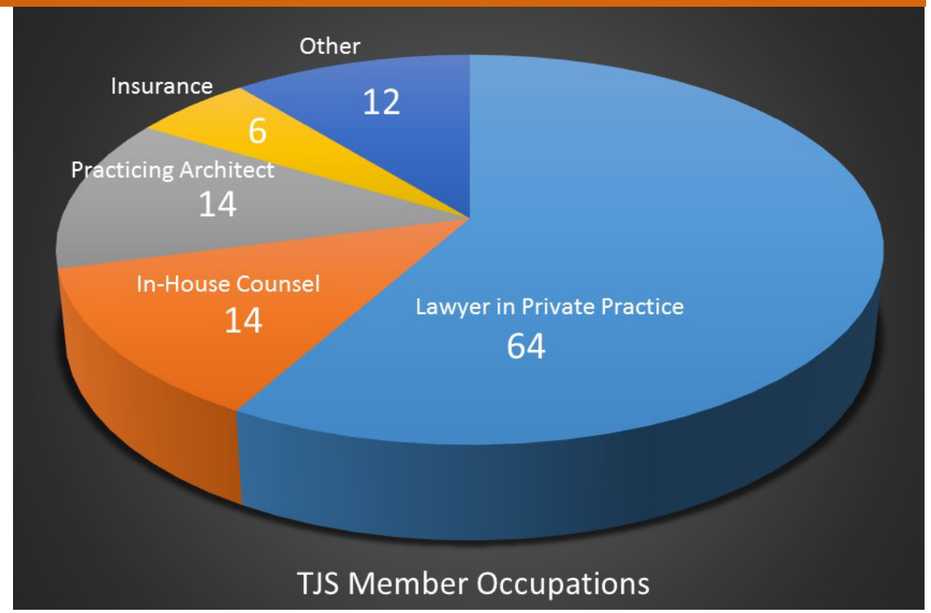
(iii) the indemnification provision requires the contractor to indemnify other parties to the contract against liability for damage caused by the other parties' sole negligence.

In its June 12, 2018 ruling, the federal district court held that Section 11–4.1's purposes "are quite clear," that prime contractors or other construction entities with leverage over subcontractors are prevented from using that leverage to force subcontractors to indemnify prime contractors and others for their negligence. As a result, the provision was void in its entirety. Travelers challenged whether the architect was a "contractor" under the statute. The trial court held that the definition of "contractor" under Virginia law was broad enough to include architects involved in the supervision of construction projects, such as in this case, "and suggests that Virginia law recognizes that the term contractors can apply to entities such as architects when they are involved in the management and supervision of construction projects." In sum, because Section 2.7 of the architect's contract required the architect "as a contractor" to indemnify the builder for its sole negligence, the provision was deemed void.

Seeking to avoid dismissal, Travelers argued that the architect breached its contract by failing to procure required insurance. The trial court rejected that argument also, saying, "the problem with this breach of contract theory is simply that it was not alleged in the complaint * * * Accordingly, Travelers' new and tardy breach of contract theory does not save Count I as it is in its present form, and that count must still be dismissed, albeit with leave for Travelers to amend to plead a breach of contract claim if it is able to do so consistent with Rule 11, Fed. R. Civ. P." The case is *Travelers Indemnity Co. v. Lessard Design, Inc.,* 2018 WL 2939014 (E.D. Va. 2018).

Ohio: Architect's Breach of Contract Claim Preempted By Copyright Act

An architectural firm sued its client for breach of contract for allegedly using copyrighted architectural drawings to obtain a building permit in Cincinnati without authorization. The trial court granted the client's motion to dismiss stating that the claims were within the exclusive jurisdiction of the federal courts under the Copyright Act. The architectural firm appealed. The Ohio Court of Appeals affirmed, holding



that the firm failed to present a state-law based breach-of-contract claim containing an extra element that would survive preemption of the Copyright Act.

With respect to exclusive federal jurisdiction in copyright cases, 28 U.S.C. 1338(a) provides: "The [federal] district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to * * * copyrights * * *. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to * * * copyrights." The Court of Appeals noted that "Architectural drawings undisputedly are afforded copyright protection, as they fall within the subject matter of copyright." However, the architect argued that absent registration, a federal court lacks subject-matter jurisdiction over its infringement claims, and suggested that a state court would then have subject-matter jurisdiction over the dispute. The Court flatly rejected this argument, noting that, "The Copyright Act, with a few exceptions not relevant here, requires copyright holders to register their works before suing for copyright infringement and obtaining certain remedies," and a copyright holder's failure to register has no bearing on the preemption of state-law claims. Thus, the architect could not avoid the preemptive effect of the Act by failing to timely register its drawings in accordance with the Act. The architect then argued, in the alternative, that its claim for breach of contract did not invoke federal copyright law and was not preempted. However, the Court of Appeals held that a state common-law claim is preempted if: "(1) the work is within the scope of the 'subject matter of copyright,' * * * (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright law." As a result, the claim was preempted even though the architect did not register the architectural drawings. The case is *First World Architects Studio, PSC v. McGhee*, 2018 WL 2727912 (Ohio App. 1 Dist. 2018).

Thomas Jefferson, U.S. Ambassador to France!

In addition to writing the Declaration of Independence, and serving in many other roles (including President of the United States), Thomas Jefferson served as Governor of Virginia and as a Delegate to the Confederation Congress. For all of his accomplishments here, some forget that Mr. Jefferson served for five years in France as Minister "Plenipotentiary" (or with full authority) (1785-1789), where he joined John Adams and Benjamin Franklin to negotiate commercial treaties with European powers. On returning home, Jefferson became the first U.S. Secretary of State under George Washington (1790-1793), followed by his election as Vice President under John Adams (1796-1801), and two terms as U.S. President (1801-1809). Let's look back on his time in France, some 15 years before he entered the White House.

It is said that from his youth, Jefferson had dreamed of taking the Grand Tour of Europe, but it wasn't until the 41-year old widower received a diplomatic appointment to Paris in 1784 that the dream became a reality. As Minister to France, Thomas Jefferson lived in Paris for five years that were, according to his biographers, "arguably the most memorable of his life." Paris, "with its music, its architecture, its savants and salons, its learning and enlightenment, not to mention its elegant social life, had worked its enchantments on this rigidly self-controlled Virginia gentleman, and had stimulated him to say and do and write remarkable things," his biographers wrote. Being recently widowed, he likely believed that time in France would help heal the wounds of losing his beloved wife, Martha (who died at the age of 33 with Mr. Jefferson at her bedside). Shortly before her death, Martha made Jefferson promise never to marry again, telling him that she could not bear to have another mother raise her children. As a result, when appointed U.S. Minister to France, Jefferson and his daughter, Martha (named after his wife), arrived in Paris in the summer of 1784 and met with Benjamin Franklin, also an American foreign minister to France. Franklin was Jefferson's mentor, teaching the art of international diplomacy. Jefferson's job as ambassador to France was basically to cultivate a close relationship and secure treaties that would be in the best interest of the United States.

Thomas Jefferson, U.S. Ambassador (Minister) to France (1785-1789).

A "Renaissance man" in every sense of the word, Thomas Jefferson developed a deep appreciation for France and its culture. In Paris, he was introduced to the leading artists of the day. Especially interested in architecture and smitten with domes, Jefferson toured Soufflot's new domed church, Sainte Geneviève (now the Pantheon). Jefferson developed a close relationship with the Marquis de Lafayette, a French military officer who had fought alongside the Continental Army in the Revolutionary War. Lafayette would go on to become a leading figure in France's own Revolution, which took place during Jefferson's tenure in that country, resulting in the overthrow of King Louis XVI and the creation of the First French Republic.

As Minister to France, Jefferson was America's man on the ground in Paris in July 1789 when the French people rose up against their rulers and the first blood was shed in the opening days of the French Revolution. Jefferson was actually living in the Hôtel de Langeac in Paris when the Bastille was stormed. As the streets of Paris descended into lawlessness, chaos, and violence, Jefferson and his secretary, William Short, roamed the streets to learn firsthand what was happening. As a supporter of the French Revolution, Jefferson met regularly with his friend the Marquis de Lafayette, now a rebel, and even advised him on how to conduct revolutionary activities.

In a 12-page letter to John Jay, U.S. Secretary of Foreign Affairs, dated July 19, 1789, Ambassador Jefferson recounted how a mob seeking to arm themselves, stormed the Bastille (the 14th-century fortress used as a prison), took the stash of arms, freed the prisoners, and seized the "Governor" of the Bastille, who was then killed and beheaded in the city streets. A later portion of the letter recounts the panic at the King's court at Versailles resulting from false reports that a mob of 150,000 was on their way to "massacre the Royal family, the court, the ministers and all connected with them."

Prior to the Revolution, Jefferson brought remarkable talents the guiding of U.S. foreign affairs. In 1785, Jefferson successfully negotiated the Treaty of Amity and Commerce between the Kingdom of Prussia and the United States, an agreement that established a commercial alliance between the U.S. and the Kingdom of Prussia (today, Germany). It was signed by George Washington and Prussia's King Frederick the Great. This was an important treaty, not only because of its implications for commerce but also because the U.S. was recognized as an equal trade partner by a major European power.

In 1788 another important treaty was signed through Jefferson's leadership, The Consular Convention with France, an agreement on protocols for the proper treatment of each country's consuls. Before this treaty, American consuls living in France and French consuls living in America were subject to differences in treatment. The Consular Convention established a uniform standard of treatment and benefits for the two nation's consuls, a forerunner to today's Vienna Convention on Diplomatic Relations.

On his return home, George Washington appointed Thomas Jefferson as the first Secretary of State. Tension within Washington's cabinet, notably with Treasury Secretary Alexander Hamilton, who favored an assertive central government, prompted Jefferson's eventual resignation.

Jefferson's legacy in France continues to this day. In Feb. 2014, U.S. Pres. Barack Obama and French Pres. Francois Hollande toured Thomas Jefferson's plantation estate Monticello in a show of solidarity for Franco-American ties that have endured for more than two centuries despite the occasional tempest. In Paris, Mr. Jefferson's statue (below) sits at the foot of the Pont Solferino, the pedestrian bridge that connects the Tuileries to the Musée d'Orsay. Tourists visiting the Musée d'Orsay can say hello to Jefferson's statue before walking across the bridge to the Tuileries to visit the L'Orangerie art museum.

Last year, the French Embassy in the U.S. launched the Thomas Jefferson Fund to support collaborations between young researchers in France and the U.S., inspired by Jefferson's commitment to French-American relations.

The Thomas Jefferson Monument sits on a stone pedestal at the foot of the Pont Solferino bridge.

Minnesota: Insurer Had Duty to Defend Design-Builder

The trial court granted summary judgment to a design-build firm ("Miller"), finding that its insurer ("Westfield") breached its duty to defend Miller in an arbitration proceeding involving allegedly faulty design and construction of an apartment building in Grand Forks, N.D. Miller then sought entry of judgment on Westfield's duty to defend, a stay pending the outcome of the underlying arbitration, and an award of attorney's fees, costs, and statutory prejudgment interest. The court noted that under Minnesota law (which was applicable), the duty to defend and the duty to indemnify are two issues, not one. Without the entry of judgment as to Westfield's duty to defend, Miller was unable to recoup its attorney's fees plus significant prejudgment interest. The court noted that, "the hardship to Miller if partial judgment is not entered is undeniable, [a]nd an appeal on the duty to defend would not necessarily result in piecemeal appeals, because that issue may be dispositive of all coverage issues in the case."

However, the insurer argued that a ruling that it was obligated to defend Miller was not appropriate because Miller did not move for summary judgment on that claim, but only on the insurer's declaration of non-coverage. The court rejected this, saying "Westfield's argument elevates form over substance. The Court found that Westfield has a duty to defend Miller. Entry of judgment on that issue is undoubtedly appropriate."

As to Miller's request to stay the remainder of the case (on the duty to indemnify) pending the outcome of the arbitration proceeding, the insurer did not oppose a stay but argued that the court should require Miller to respond to discovery requests related to Westfield's duty to indemnify. The court denied the discovery, noting that Miller acknowledged its duty to keep Westfield apprised of information regarding the arbitration and if Miller was not providing Westfield with sufficient information about the arbitration, Westfield could seek appropriate relief from the magistrate. Therefore, the balance of the suit was stayed.

The court then awarded Miller prejudgment interest calculated from the date Miller tendered its defense to Westfield, not the date of each individual attorney's invoice. Miller was awarded $167,465 for defense of the underlying arbitration from inception, plus $194,458 for defense of this declaratory judgment litigation against Westfield, plus prejudgment interest. See, *Westfield Ins. Co. v. Miller Architects & Builders, Inc.,* 2018 WL 3831347 (D. Minn. 2018).

D.C.: Owner's Negligence Claim Was Time-Barred Against Architect

This case relates to the the services of an architect on a $10 million tennis and education facility in Southeast Washington, D.C. "Dealings between the parties went awry not long after [construction began], caused by a host of perceived design and construction defects," the court said. By letter dated July 14, 2014, the owner submitted a request for mediation to the architect pursuant to section 8.2 of the Architect Agreement.

When mediation proved unsuccessful, the owner filed suit on Nov. 10, 2015 asserting two claims: 1) breach of the parties' contract, known as the "Architect Agreement," and (2) breach of a common law duty of professional care. The architect filed a counterclaim for breach of contract, seeking payment for unpaid invoices and interest in the amount of $47,515, plus additional interest. The trial court entered summary judgment for the architect and the owner moved for reconsideration or, in alternative, for certification of interlocutory appeal.

The trial court denied the motion, finding that the owner's mediation demand did not toll the statute of limitations period for professional negligence claims against the architect; nor did the "discovery rule" toll running of the limitations period for owner to bring professional negligence claims. As a result, the owner's professional negligence claims were time-barred.

The parties agreed that a 3-year statute of limitations applied. *See* D.C. Code § 12-301(3). The court focused on section 8.2.1 of the Architect's Agreement which provided: "Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation as a condition precedent to binding dispute resolution." "Full stop. Period." The court held that the clause does not go on to require that the mediation demand be made "within the period specified by applicable law."

As a result, filing of the mediation demand did not equitably toll the limitations period for the owner's claims. The court said: "While Article 8 requires mediation as a condition precedent to filing suit, it clearly provides that a request for mediation 'may be made concurrently with the filing of a complaint.' "

As to the start of the limitations period, the court found that the owner was not an unsophisticated entity. The architect identified March 1, 2012 as the date the building permit was issued, showing that the design was complete as of that date. The owner had sophisticated consultants review the design prior to that date. As a result, the court found that any issues with the design documents "accrued," at the latest, when the architect's design services were completed on March 1, 2012. Since suit was filed on Nov. 10, 2015, well beyond the 3-year period, it was time-barred. The court denied the owner's request to grant an interlocutory appeal, finding that such would more likely impede — rather than materially advance — the progress of this litigation.

The court side-stepped the architect's argument that the economic loss rule applied to preclude the owner from seeking to recover economic losses under a tort claim, since the owner's claim was time-barred by statute, making that argument moot. *Washington Tennis & Education Foundation, Inc. v. Clark Nexsen, Inc.*, 2018 WL 3978099 (D.D.C. 2018).

Texas: Insurer Had Duty to Defend Engineer; Strict Interpretation of the "Eight Corners" Rule

The dates are important here, so read carefully. Everest issued an Architects and Engineers Professional Liability Insurance Policy ("Policy") to Gessner for the policy period Aug. 1, 2015 to Aug. 1, 2016; renewed with a virtually identical Policy for the policy period Aug.1, 2016 to Aug. 1, 2017. The Policy provided coverage for claims made against Gessner for "wrongful acts arising out of the performance of professional services" if certain conditions are satisfied. The Policy required Everest to defend Gessner against "any covered claim, even if such claim is groundless, false or fraudulent."

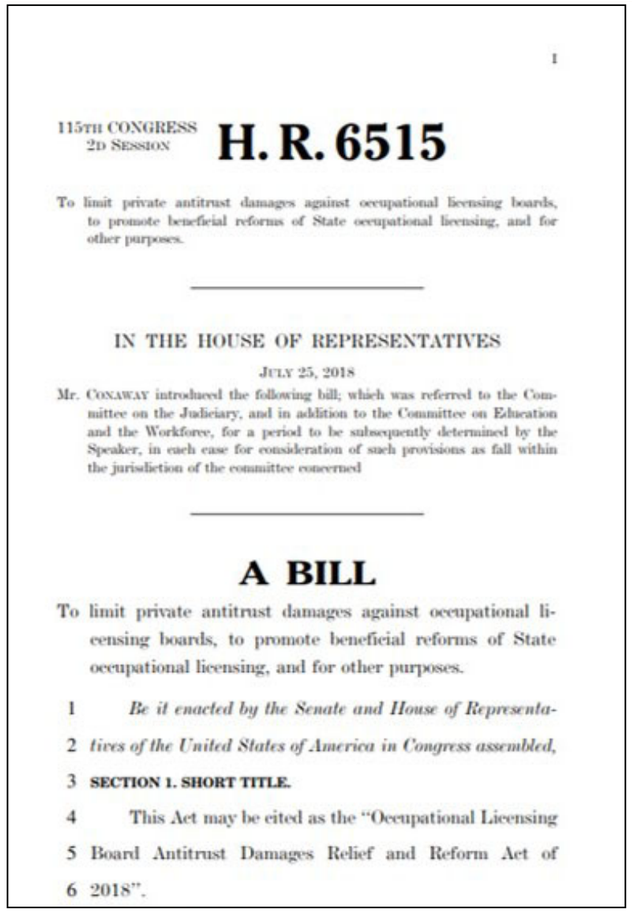
An owner hired Gessner to provide civil, geotechnical, and structural engineering for a construction project on which began in late Feb. 2013. Starting in the spring of 2014, the owner noticed water seepage near the walls in the basement area and, in February 2015, the owner filed a lawsuit against Gessner and various contractors on the project ("Suit A"). The owner then voluntarily nonsuited and dismissed Gessner from that lawsuit. In Jan. 2016, the owner filed a First Amended Petition in Suit A, again naming Gessner as a defendant. In 2015, the owner noticed water infiltration into the basement from underneath the slab. So, on Feb. 18, 2016, the owner filed a second lawsuit against Gessner ("Suit B"). Based on the owner's failure to attach the correct certificate of merit to Suit A, Gessner moved to dismiss, which was granted in late March 2016. On April 1, 2016, the owner filed yet a third new lawsuit ("Suit C") against Gessner, which Gessner answered on May 2, 2016. There was no allegation in Suit C, however, that the owner gave Gessner notice of this belief prior to the Policy inception date of Aug. 1, 2015.

There is no mention in Suit C that the owner filed any prior lawsuits against Gessner.

Not until Sept. 14, 2016 did Gessner notify Everest of the third lawsuit, Suit C and requested a defense and indemnity under the Policy. Everest agreed to provide a defense for Suit C, subject to a reservation of rights. However, on Oct. 5, 2017, Everest filed suit seeking a declaratory judgment that it did not owe Gessner a duty to defend in Suit C. Gessner filed a counterclaim seeking a declaratory judgment that Everest owed it a duty to defend. The parties then filed cross-motions for summary judgment.

The federal trial court ruled that an insurer owes its insured a duty to defend if, in the underlying lawsuit, "the plaintiff's factual allegations potentially support a covered claim." Texas law applies the "eight-corners rule," that provides that the duty to defend is determined solely by reviewing the insurance policy and the plaintiff's pleadings in the underlying lawsuit.

Everest argued that the court should apply an exception to the eight-corners rule to allow extrinsic evidence of the prior two lawsuits by the owner against Gessner. However, the court held that, "Despite various requests over the years to recognize exceptions to the eight-corners rule, the Supreme Court of Texas has never done so." As a result, the court declined to do so here, as well, finding that under the eight-corners rule, Everest had a duty to defend Gessner in Suit C. See, *Everest National Ins. Co. v. Gessner Engineering, LLC,* 2018 WL 3361458 (S.D.Tex. 2018).



115TH CONGRESS
2D SESSION

H. R. 6515

To limit private antitrust damages against occupational licensing boards, to promote beneficial reforms of State occupational licensing, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 25, 2018

Mr. CONAWAY introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Education and the Workforce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To limit private antitrust damages against occupational licensing boards, to promote beneficial reforms of State occupational licensing, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Occupational Licensing Board Antitrust Damages Relief and Reform Act of 2018".

ACEC & NSPE Support Legislation to Protect Licensing Boards

It was reported in the Sept/Oct issue of *Engineering, Inc.* that ACEC has joined with the NSPE to submit testimony for a congressional hearing on H.R. 6515 (above), a bill dealing with occupational licensing and barriers to economic mobility. The joint statement supports strong professional licensing standards for design professionals due to the essential role they play in protecting public health and safety. The bill is part of an ongoing debate over the costs and benefits of state licensure for various occupations and professions and how to achieve the right balance between public safety and economic opportunities. In addition, there was discussion of "portability of licenses" across state lines, particularly to accommodate those military spouses who move frequently.

The legislation is in response to a 2015 Supreme Court decision in *FTC v. North Carolina Board of Dental Examiners,* 135 S. Ct. 1101 (2015). According to ACEC, licensing boards have generally assumed they have the same antitrust immunity as state governments, but the high court's decision stated that boards only have antitrust immunity if they are "actively supervised by the state." This decision has led to over 30 complaints filed against various licensing boards, potentially exposing boards and their individual members to treble damages. Rep. Mike Conaway (R-Texas) introduced H.R. 6515, which would limit private antitrust damages against boards and their members if the occupation is licensed in at least 40 states, the board members are appointed by the governor or another elected officer of the state, and the board has at least one public member. Although ACEC believes that Congress is unlikely to consider licensing boards legislation this year, ACEC will continue working for a balanced solution to this problem.

In the 2015 case, the Supreme Court held that a state occupational licensing board that was primarily composed of persons active in the market it regulates has immunity from antitrust law - only when it is actively supervised by the state. Acting upon complaints by dentists, the Board had issued cease-and-desist orders to non-dentists offering tooth whitening services and warned that teeth whitening product manufacturers may be practicing without a license in dentistry, a criminal offense. These orders prompted many non-dentists to stop offering these services in North Carolina. The Federal Trade Commission filed a complaint to the FTC administrative court alleging that the Board's actions were anti-competitive and unlawful under the Federal Trade Commission Act. An administrative law judge refused to dismiss the complaint on the Board's claim that they had state-action immunity and later ruled that the Board's concerted action constituted an unreasonable restraint of trade and a method of unfair competition, falling afoul of antitrust law. The ruling was sustained by the Fourth Circuit Court of Appeals and the Supreme Court granted cert.

In response, H.R. 6515 was introduced on July 25, 2018, titled the "Occupational Licensing Board Antitrust Damages Relief and Reform Act of 2018." The guts of the bill are in Section 3(a), which states:

"In General. No damages, or interest on damages, may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) by any person, except for any State, instrumentality of a State, or employee of a State or instrumentality of a State acting in his or her official capacity, from an occupational licensing board, or any member, officer, employee, or agent of a board, acting in their official capacity, if (1) the State: (A) has enacted a law requiring an occupational license to practice the lawful occupation regulated by the occupational licensing board; (B) has set forth criteria outlining any personal qualifications necessary to obtain an occupational license and has required that licensees adhere to standards of practice and ethical standards in the performance of regulated lawful occupations; and (C) has found that (i) the public needs, and can be reasonably expected to benefit from, occupational licensing of the lawful occupation; and (ii) the unlicensed conduct of the lawful occupation would harm or endanger the health, safety, or welfare of the public; (2) an occupation licensed by an occupational licensing board: (A) is a widely regulated occupation; or (B) (i) is not a widely regulated occupation and the State has implemented a periodic sunset review process of the occupational licensing board with regard to that occupation; and (ii) if previously unregulated by the State, the State has implemented a sunrise review process of the occupational licensing board with regard to its regulation of that newly-licensed occupation; (3) the chief executive, legislature, or other elected officer of the State: (A) has appointed all members of the occupational licensing board; and (B) has required public representation on the occupational licensing board; and (4) the State or the occupational licensing board has established a mechanism under which any person aggrieved by an action of the occupational licensing board has the right to: (A) contest such action at a hearing before the occupational licensing board at which the individual may provide evidence, argument, and analysis; (B) review, at a reasonable time before the hearing, all evidence that the occupational licensing board has gathered relating to the contested action; (C) receive a final reasoned decision in writing from the occupational licensing board within a reasonable period after the hearing; and (D) appeal an adverse decision of the occupational licensing board to an independent adjudicator, including judicial review."

Section 4 goes on to state that within 120 days after the date of enactment, the Comptroller General shall submit to Congress a report on how States can: (a) best address occupational licensing reform; (b) conduct comprehensive cost-benefit assessments of occupational regulations and occupational licensing boards through sunrise reviews and periodic sunset reviews; (c) implement policies to support occupational licensing uniformity and occupational license portability, including streamlined licensing portability programs for veterans and military service members and spouses; and (d) how occupational licensing requirements affect low-income workers, the unemployed, immigrants with work authorizations, and individuals with criminal records.

The bill is currently pending before the House Committee on the Judiciary, in addition to the Committee on Education and the Workforce.

We will continue to track this legislation and report back in a future issue of *Monticello*.

MARK YOUR CALENDAR FOR JUNE 5, 2019 THE ANNUAL JEFFERSON SOCIETY MEETING & ELECTIONS

LAS VEGAS

Make plans to attend the ***Seventh Annual Meeting of The Jefferson Society,*** which will take place in Las Vegas on Wednesday, ***June 5, 2019,*** just prior to the opening of the AIA National Convention, held June 6-8, 2019.

The Cardinal - Change Doctrine

G. William Quatman
Burns & McDonnell
Kansas City, MO

What Is A "Cardinal" Change Anyway? We have all heard this expression before, but perhaps not completely understood its meaning. Essentially, when the scope of contract changes are so overwhelming that the project built is far different from the original contracted work, a contractor may claim that the original contract has been "abandoned" under a theory known as the Cardinal Change Doctrine. This doctrine is mostly found in federal government Court of Claims cases where the government makes a fundamental and unilateral change to a contract beyond the scope of what was originally contemplated. Under established federal case law, a "cardinal change" is technically a breach of contract that occurs when the government effects an alteration in the work so drastic that it requires the contractor to perform duties materially different from those originally bargained for.

A cardinal change cannot be minor and must be so profound that it cannot be redressed under the contract changes clause and, thus, renders the government in breach. The basic question in these cases is whether the modified job "was essentially the same work as the parties bargained for when the contract was awarded." If so, the contractor has no right to complain of a cardinal change. Numerous cases hold, however, that when the government implements such drastic and profound changes, "[s]uch a material breach has the effect of freeing the contractor of its obligations under the contract, including its obligations under the disputes clause." See, e.g., *Becho, Inc. v. U.S.*, 47 Fed.Cl. 595, 600 (2000). The risk in these cases for a contractor is whether to abandon the work based on a perceived cardinal change and, later, be found wrong - triggering a performance bond claim by the government against the contractor's surety. The risk is so great, it has been noted that, "the cautious contractor might often proceed under the revised contract because of doubt whether he could invoke the cardinal change doctrine." *Allied Materials & Equip. Co., Inc. v. U. S.,* 569 F.2d 562, 564 (Ct.Cl. 1978).

Remedies and Proof Required.

If a cardinal change has occurred, the contractor is not limited to a suit for extra costs incurred in performing duties fundamentally outside of the scope of the contract. If the contractor has been prevented from performing, as in any breach case, the award of anticipatory profits is also an appropriate remedy. The existence of a cardinal change is principally a question of fact, requiring that each case be analyzed individually in light of the totality of circumstances. *Wunderlich Contracting Co. v. U.S.,* 351 F.2d 956, 966 (Ct.Cl.1965). As such, there is no exact formula for determining the point at which a single change of a series of changes are considered so drastic as to constitute a "cardinal change." Each case must be analyzed on its own facts, considering the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole.

For normally anticipated changes or design defects, a contractor is entitled to an equitable adjustment under the changes clause of its contract for increased costs of performance. *Edward R. Marden Corp. v. U.S.*, 442 F.2d 364, 369 (Ct.Cl. 1971). But where "drastic consequences" follow from defective specifications, courts sometimes have held that the change was not within the scope of the contract, i.e., that it was a cardinal change. *Id.*

Because a cardinal change fundamentally alters the contractual undertaking of a contractor, such changes are not comprehended or redressable by the standard government FAR clauses, which are designed to convert traditional breaches of contract into changes for which equitable adjustments could be pursued. *Becho, Inc.*, supra, at pp. 600–01.

Constructive vs. Cardinal Changes.

Courts distinguish between a "constructive change" and a "cardinal change." In a 2014 case, the court stated: "To demonstrate a constructive change, a plaintiff must show (1) that it performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government. (citations omitted). A cardinal change is similar, but has two distinguishing features: (1) a cardinal change requires work materially different from that specified in the contract, and (2) a cardinal change amounts to an actual breach of contract." *Bell/Heery v. U. S.*, 739 F. 3d 1324, 1335 (Fed.Cir. 2014).

Application in State Courts.

The Cardinal Change Doctrine is not limited to federal projects, nor even to public contracts or to prime contracts. Some states have adopted the doctrine for private sector projects as well, and to disputes between contractors and their subcontractors. For example, in a 1993 Kentucky case, the doctrine was applied to a Toyota manufacturing facility. *L.K. Comstock & Co., Inc. v. Becon Const. Co., Inc.,* 932 F.Supp. 906 (E.D.Ky. 1993). The court held that Kentucky law requires "clear and convincing" proof of modification or abandonment of written contracts, which applied to a cardinal change claim and that the subcontractor failed to meet that burden. However, in a 2004 Nevada case involving a private exposition center, the Nevada Supreme Court adopted the Cardinal Change Doctrine and found that a subcontractor properly established a cardinal change claim. *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.,* 89 P.3d 1009 (Nev. 2004). The court recognized that although the doctrine was largely found in government contract cases, "its underlying premise — that compensation for costs resulting from an abuse of authority under the changes clause should not be limited by the terms of that clause — applies to private contracts that include changes clauses. Consequently, we conclude that this cause of action is viable in the context of private construction contracts." Other states have rejected the application of the Cardinal Change Doctrine to claims outside of the federal sectors. In a 1985 case, a federal district court in Mississippi rejected the Cardinal Change Doctrine, holding that Mississippi law clearly and unequivocally denies extra-contractual relief where the parties have expressly contracted upon a subject. *Litton Systems, Inc. v. Frigitemp Corp.*, 613 F.Supp. 1377 (S.D.Miss.1985). The court said, "It is clear, therefore, that Mississippi does not subscribe to the cardinal change doctrine, and that even if such was the law in Mississippi, the relief to be accorded would be damages for breach of contract and not the extra-contractual relief of quantum meruit." In 2002, another federal court declined to apply the doctrine in Ohio, stating that the court believed that the Ohio Supreme Court would likely decline to adopt the Cardinal Change Doctrine. *Ebenisterie Beaubois Ltee v. Marous Bros. Const., Inc.,* 2002 WL 32818011 (N.D.Ohio 2002).

MEMBERS ON THE MOVE:

Francisco J. Matta, AIA, Esq. has moved. Please make note of his new contact information:

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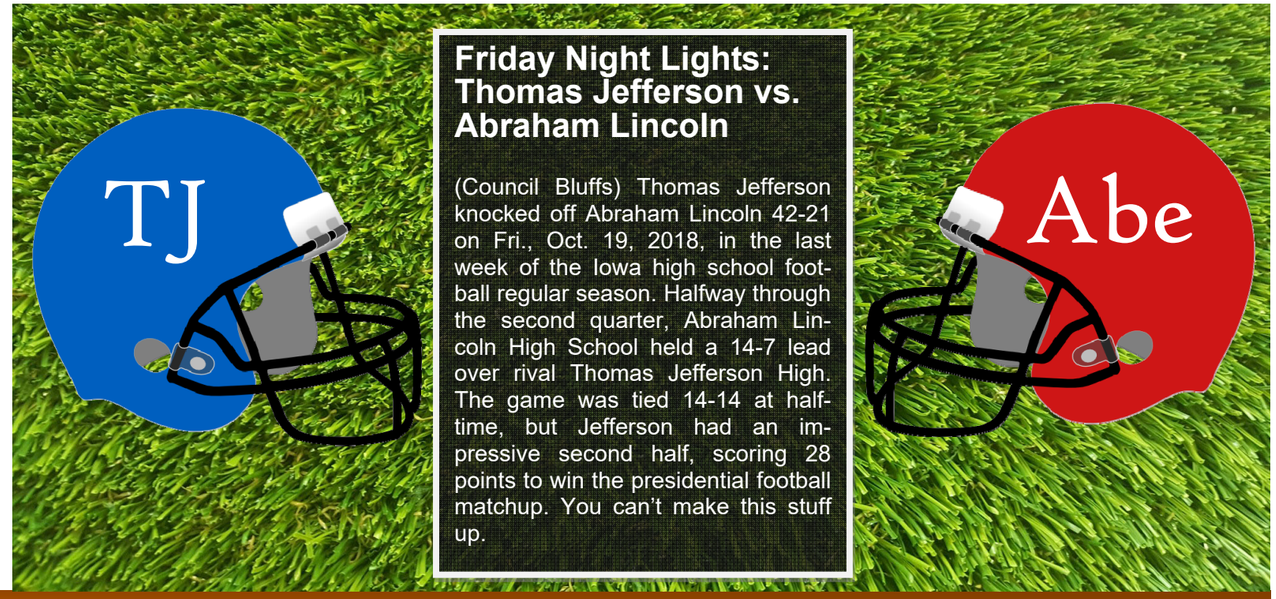
Have you changed firms, or moved locations recently? Let us know so we can keep the website up to date and let our members know how to reach you. Email changes to: bquatman@burnsmcd.com



Friday Night Lights: Thomas Jefferson vs. Abraham Lincoln

(Council Bluffs) Thomas Jefferson knocked off Abraham Lincoln 42-21 on Fri., Oct. 19, 2018, in the last week of the Iowa high school football regular season. Halfway through the second quarter, Abraham Lincoln High School held a 14-7 lead over rival Thomas Jefferson High. The game was tied 14-14 at halftime, but Jefferson had an impressive second half, scoring 28 points to win the presidential football matchup. You can't make this stuff up.

"… and our own dear Monticello, where Nature spread so rich a mantle under the eye? Mountains, forests, rocks, rivers. With what majesty do we there ride above the storms! How sublime to look down into the workhouse of nature, to see her clouds, hail, snow, rain, thunder, all fabricated at our feet! And the glorious Sun, when rising as if out of a distant water, just gilding the tops of the mountains & giving life to all nature!"

- Thomas Jefferson to Maria Cosway, Paris, Oct. 12, 1786

New York: Architect Can Maintain Counterclaim for Breach of Contract Even if Plaintiff Dismisses the Primary Action Against It

This is the second suit by a condo developer against its architect and engineer after a renovation project. The first suit for negligence and malpractice was dismissed based on the statute of limitations, which had run. The new suit was for common law indemnity. The architect signed a letter agreement that was amended several times. The mechanical engineering was performed by a subconsultant. The plaintiff alleged negligent designs in the condo heating, ventilation and air conditioning systems which required the condo board of managers and the owner of one unit to undertake remedial work. After the board and the unit owner threatened to sue the condo developer, the parties settled for $250,000 in order to avoid a lawsuit. The developer then sued the architect for indemnity for the settlement. The architect filed a cross-claim against the engineer, and a counterclaim against the developer for breach of contract and unjust enrichment. The developer moved to dismiss with prejudice the architect's counterclaim and the engineer moved to dismiss the cross-claim.

As to the architect's counterclaim for breach of contract, the developer argued that nothing was owed due to the offsetting indemnity claim, which also eliminated the claim for unjust enrichment as a matter of law (the existence of an express agreement which covered the claim's same subject matter). The architect pointed out an odd clause in the letter agreement which stated that: "Owner agrees that in the event Owner commences a claim against Architect, Architect may assert, and recover as the evidence supports, by way of counterclaim, offset or affirmative defense the amount of fees that otherwise would be due Architect."

In an action based on common law indemnification, the court noted that the New York 6-year statute of limitations starts to run upon the date of payment which, in this case, was some time in Sept. 2015. "Implied indemnity is a restitution concept which permits shifting of the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." The principle of common - law, or implied indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. "The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather a 'separate duty owed the indemnitee by the indemnitor," the court said. As a result, the plaintiff had adequately pled a cause of action in common-law indemnification. As to the architect's counterclaim, the court said, "When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms [and] courts are obliged to interpret a contract so as to give meaning to all of its terms." As applied here, the court found that the architect had also adequately stated its counterclaim for breach of contract against the developer. The developer then moved to dismiss its indemnification claim and argued that this should result in dismissal of the architect's counterclaims. However, even if the developer dropped its indemnity claim, the court ruled that the architect's counterclaim can survive without the main claim.

Based upon the developer's dropping of its indemnity claim, however, the court granted the consulting engineer's motion to dismiss the architect's cross-claim as moot. See, *22 Gramercy Park, LLC v. Michael Haverland Architect, P.C.*, 2018 WL 4231925 (N.Y. Sup. 2018).

Illinois: Copyright Suit Dismissed for Failure to Attach the Design to the Lawsuit!

Two architectural design companies that creat home plans and sell design licenses discovered home plans on the websites of another architect ("WK") that appear to copy their designs. In order to protect their copyrights, the plaintiffs filed a suit against WK and its controlling shareholder. Plaintiffs sued for willful and non-willful copyright infringement in violation of the Copyright Act, 17 U.S.C. § 106, and for violation of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1202. WK and its shareholder moved to dismiss the complaint for failure to state a claim. The plaintiffs argued that they had created over 350 new home designs since 2009, which they had registered with the U.S. Copyright Office. They offer single-build licenses for their home designs for a fee ranging from $700 to $6,000, and generated over $6 million in licensing revenue from over 8,000 licenses. The plaintiffs claimed that, as marketing has increased, so has the piracy of their copyrighted home designs. This has led to the designer filing multiple lawsuits to discourage copyright infringement of the architectural works.

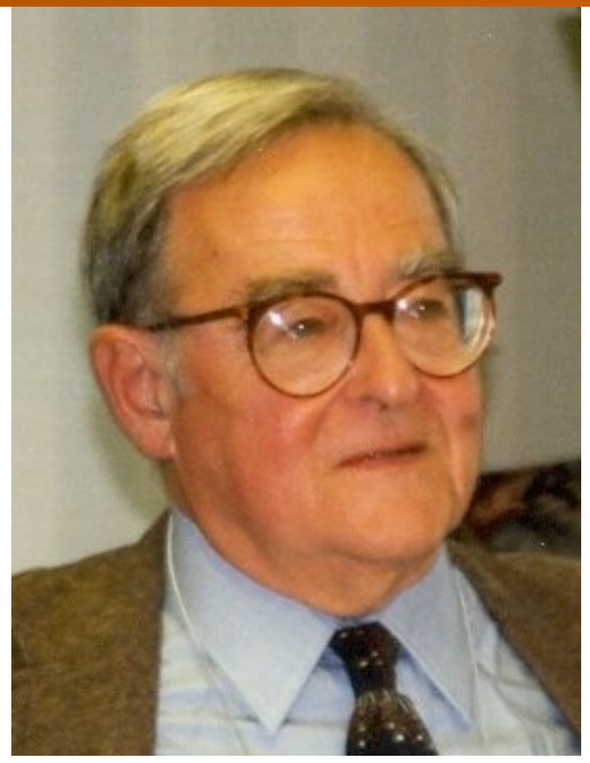
Architect-Lawyer Thomas Jefferson was one of the Founding Fathers of America, the principal author of the Declaration of Independence, and later served as the third President of the U.S.

The court pointed out that in order to state a claim for copyright infringement, the plaintiffs must plausibly allege that: 1) they own a valid copyright, and 2) WK copied "constituent elements of the work that are original." The defendants acknowledged that plaintiffs hold valid copyrights, but argued that plaintiffs' claims fail to sufficiently set forth the required second prong of a copyright infringement claim. Copying of constituent elements can be shown in two ways: 1) through direct evidence, such as an admission of copying by the defendant; or 2) showing that the defendant had an opportunity to copy the original, referred to as "access," and that the works in question are "substantially similar" to each other, or, in other words, "that the two works share enough unique features to give rise to a breach of the duty not to copy another's work." While plaintiffs did allege that WK copied the works, the court said that the plaintiffs "must do more than simply allege copying in a conclusory manner; they must provide some facts in their first amended complaint to put WK on notice of the factual basis for that allegation." Here, the plaintiffs did not provide even a representative example of how WK's plans directly replicate theirs or include similar features, "leaving WK guessing as to what forms the basis of plaintiffs' infringement claim." Therefore, there was no facts upon which the court could find "substantial similarity." The court stated that, as a result, it, "cannot even begin this analysis because plaintiffs have not identified the elements of their copyrighted plans that they contend are protected by copyright law or those elements of WK's plans that they claim infringe on their copyrights." Since plaintiffs had not done so, the court dismissed their copyright infringement claims.

The case is *Design Basics, LLC v. WK Olson Architects, Inc.,* 2018 WL 3629309 (N.D. Ill. 2018).

In Memory of:

Carl Sapers, Hon. AIA, Esq. (1932-2018)



Prominent Boston lawyer, Carl Sapers died on Weds., July 18, 2018, after a brief illness. A lawyer with a wide-ranging career who specialized in working with architects, he was a partner and then managing partner at Hill and Barlow for 45 years, retiring in 2002. Mr. Sapers was one of the country's pre-eminent lawyers in architecture and construction law. He was awarded the American Institute of Architects' Allied Professions Medal in 1975 for outstanding achievement in a non-design profession and taught and published widely on the subject.

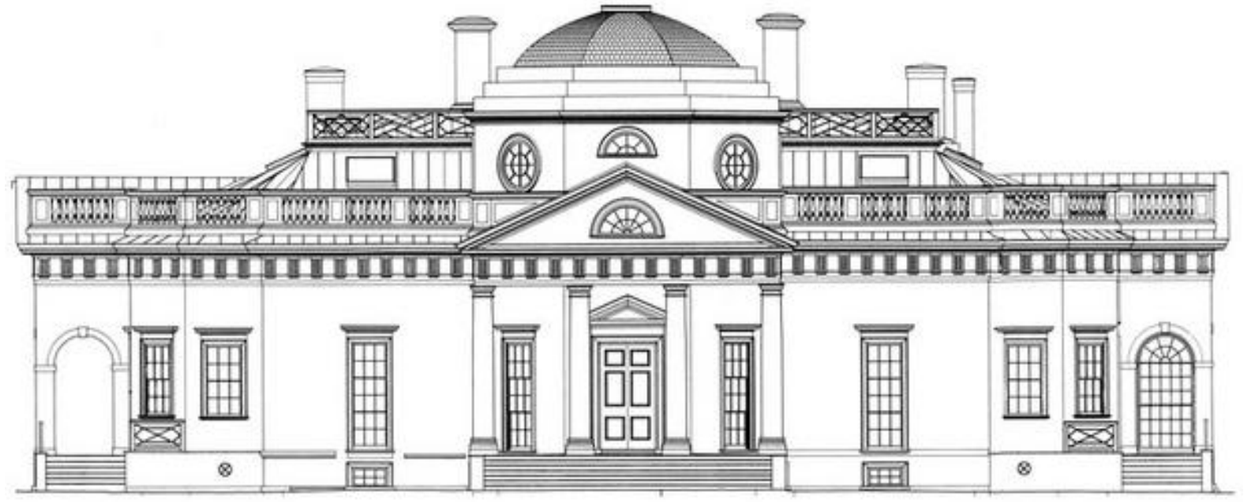
Born in Boston in 1932 and educated at Harvard College and Harvard Law School, he joined the law firm of Hill and Barlow and after a leave to serve on the Massachusetts Crime Commission returned to become a partner in 1966. He traveled to the Middle East on behalf of The Architects Collaborative (TAC) in connection with a project for the University of Baghdad in 1959. By the time of his AIA award, he had represented more than 50 architectural firms as general or special counsel. Among his clients were Hugh Stubbins and Associates, Shepley Bulfinch, Richardson & Abbott, Sert Jackson and Associates, Jung/Brannen and PietroBelluschi. In 1968, he became general counsel to the National Council of Architectural Registration Boards (NCARB), a role he continued in until the early 2000s. He also served as interim counsel to the AIA, which made him an honorary member in 1988. His practice became international in scope.

In 1972, he began teaching a course called "Legal Problems in the Construction Process" to students in civil engineering and architecture at MIT. Thereafter he became an Adjunct Professor of Legal Practice in Design at the Harvard University Graduate School of Design from 1984 to 1993 and an Adjunct Professor of Studies in Professional Practice in Architecture from 1993 to 2009.

He retired from Hill and Barlow in 2002 after 45 years during which he mentored young lawyers and rose to become managing partner. He retired from the Graduate School of Design in 2010. During his career he participated in a wide range of public-spirited activities. He founded the Foundation for Brookline housing which sought to promote housing for black families in the suburb in which he lived. He later served for nine years as the town's moderator. Toward the end of his life, he was a prominent member of a mostly Canadian group that successfully opposed the development of Liquid Natural Gas near Passamaquoddy Bay in Maine.

A proud liberal Democrat, he was an avid sailor, reader, lover of classical music, and cooking, whose favorite activity at his summer house in St. Andrews, NB, Canada was digging for clams and foraging for chanterelles and cooking the results into wonderful concoctions.

Mr. Sapers played an instrumental role in shaping NCARB's original Model Rules of Conduct, Legislative Guidelines. After his retirement, in 2002, he served on the Massachusetts Board of Registration of Architects from 2012-2017. During this time, he also served on NCARB's Ethics Task Force, where he joined efforts refresh the Model Rules of Conduct he helped create in 1977.



Did You Know . . . That Monticello means "little mountain" in Italian?

The exact source of the word "Monticello" as the name for Jefferson's plantation home (above) remains a mystery. Jefferson's earliest documented use of the word appears in his Garden Book entry of Aug. 3, 1767: "inoculated common cherry buds into stocks of large kind at Monticello." Yet just two years later, in his Account Book, Jefferson records that 9,787 pounds of tobacco were made at "Moncello" in 1768. Later, in a Jan. 1770 entry, Jefferson notes "work to be done at Hermitage," but at some point, he crosses Hermitage out and writes in Monticello. After this last entry, Jefferson consistently refers to his property as "Monticello."

Did You Know . . . That Thomas Jefferson Had a Secret Retreat That Looks Similar to Monticello?

Though Monticello remained Jefferson's pride and joy, he had another residence for times when he wanted to be alone. Poplar Forest, located near Lynchburg, Virginia, was an octagonal home that looked remarkably similar to Monticello. He built the retreat to exacting detail: The windows were measured so they would bring in only Jefferson's preferred amount of sunlight. The home took years to construct and was nearly ready by the time he left office in 1809. It's now open to the public. See photo, below.

New York: Negligence Claim Against Architect Is Dismissed As Duplicative of Breach of Warranty Claim.

In this case, the purchasers of a $2.8 million single-family residence filed suit against the seller (who was also the architect), asserting claims for breach of warranty, negligence, architectural malpractice, and punitive damages. The architect moved to dismiss certain claims based on the language of a "limited warranty" in the sales agreement. The warranty stated: "THIS LIMITED WARRANTY IS IN LIEU OF AND REPLACES ALL OTHER WARRANTIES ON THE CONSTRUCTION AND SALE OF THE HOME, THE BUILDINGS AND ITS COMPONENTS, BOTH EXPRESS AND IMPLIED (INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE). THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACE HEREOF. THE PURPOSE OF THIS LIMITED WARRANTY IS TO IDENTIFY THE SELLER'S RESPONSIBILITIES FOR CONSTRUCTION DEFECTS OF A LATENT OR HIDDEN NATURE THAT COULD NOT HAVE BEEN FOUND OR DISCLOSED ON FINAL INSPECTION OF THE HOME."

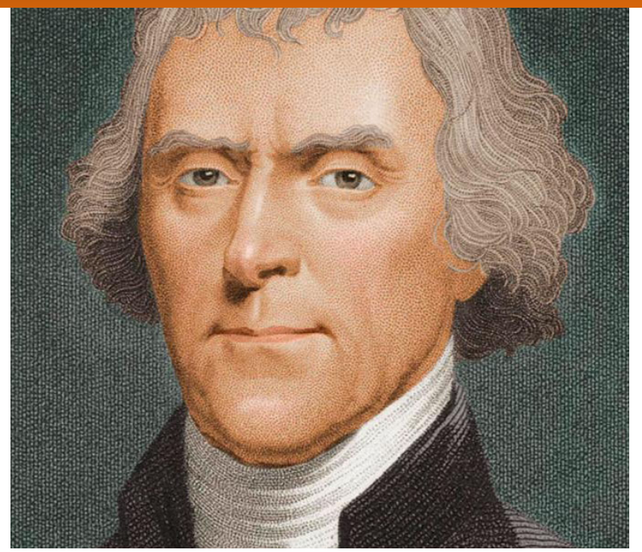
Beyond the warranty, the architect's total monetary liability was limited to $500,000, less any insurance proceeds received by the plaintiffs. Evidence showed that after the buyers took possession of the premises, and during the applicable warranty periods, they discovered latent defects in the home resulting from defective installation of the plumbing, HVAC and electrical systems. They claimed that in accordance with the procedures outlined in the Limited Warranty, the plaintiffs served a notice of claim outlining the defects discovered. When the architect/seller rejected the claim, they filed suit for damages.

The allegations in the architectural malpractice claim were virtually identical to the negligence claim, including the amount sought for economic loss, except that the plaintiffs alleged a breach of the reasonable standard of care for professional architects. The architectural malpractice claim also included a demand for punitive damages of $3.5 million due to "exceptional and/or outrageous conduct and demonstrates reckless or wanton disregard for safety or rights."

The architect moved to dismiss the plaintiffs' third (negligence) and fourth (architectural malpractice) claims on the grounds that they merely restate the breach of contract claim, and are based upon an identical set of facts. In addition, the defendant argued that the tort claims are grounded upon the theory that the architect failed to perform pursuant to the parties' contract and, therefore, the monetary loss alleged is, in effect, contract damages which are not recoverable under a tort theory. The architect also argued that punitive damages are not available for mere breach of contract as it only involves a private wrong and not a public right, and further, the Limited Warranty exclude "special" damages. The architect claimed that the circumstances presented did not warrant piercing the limitation of liability clause.

In granting the motion to dismiss, the court noted: "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. Merely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort." In determining whether a legal duty independent of a contractual obligation should be imposed, courts look to the nature of the services performed and the parties' relationship, whether the service affected with a significant public interest, and whether the failure to perform the service carefully and competently can have catastrophic consequences.

The court found that dismissal of the plaintiffs' negligence claims was warranted since the allegations are all based upon acts or omissions pursuant to the explicit terms of the Limited Warranty and plaintiffs sought the identical sum under their breach of contract claim. As to the limitation of liability and the Limited Warranty, the court stated that it saw, "no reason to disturb the parties' clear and unequivocal agreement." The damages sought were "squarely within the contemplation of the parties under the contract." As a result, the



claims for negligence and malpractice were dismissed. In addition, the court dismissed the claim for punitive damages, stating, "punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved." The case is *Millet v. Kamen*, 78 N.Y.S.3d 643 (N.Y. Sup. 2018).

Ohio: Economic Loss Doctrine Bars Negligence Claim Against Roofer

In this case, an insurance company which paid a claim for water damage to a gym floor on a high school project sued the roofing contractor, as subrogee for a local school district. In a surprising move, the roofer filed a motion for directed verdict after the jury was sworn in, but prior to opening statements, which the trial court granted. The insurer appealed that ruling, as well as the trial court's denial of its motion to amend the complaint. Beyond those two procedural issues, the insurer also asked the Court of Appeals to determine whether there was an independent common law tort cause of action to perform in a workmanlike manner even though there was a contract between the parties. The Court of Appeals ruled that the motion for directed verdict was premature. However, Ohio case law indicates if there was no prejudice, the trial court did not commit error in granting a premature motion for directed verdict. In this instance, there was no prejudice. The court explained that the trial court granted the directed verdict motion on the basis that there was no dispute that the complaint only asserted a negligence claim and there was a contract between roofer and the school district. Under the economic loss doctrine in the State of Ohio, a breach of contract does not create a separate tort claim, including a claim for negligence. There was no other claim that the plaintiff had made setting forth any damages that it had incurred as a result of any type of other independent tortious conduct.

The Court of Appeals affirmed the trial court's ruling, stating that, "The work Tomko was to perform for the School District was governed by the contract between the School District and Tomko. The basis of plaintiff's tort claim is that defendant Tomko failed to adequately perform its services under the contract . . . This falls under Tomko's obligations under the contract." The Court cited case law for the proposition that: "In Ohio, a breach of contract does not create a tort claim. Generally, the existence of a contract precludes a tort claim on the same underlying actions, unless the defendant also breached a duty owed independent of the contract. However, a tort claim based upon the same actions as those upon which a breach of contract claim is based will exist independently of the contract action if the breaching party also breaches a duty owed separately from that created by the contract." Here, since the claims were factually intertwined, the insurer argued for a finding that the failure to perform in a workmanlike manner is the independent tort. This claim was rejected on the basis that the claim for allegedly failing to perform in a workmanlike manner is governed by contract law, not tort law. Therefore, the tort claim was precluded because of the existence of a contract.

As to the economic-loss doctrine, the Court stated that the doctrine generally prevents recovery in tort damages of purely economic loss and, "The economic loss doctrine is not a means to create an independent tort when there was not one." Since the roofer's duty owed to the school district arose from the contract; the district and roofer's relationship was contractual. "Thus, any duty to perform the work correctly are related to the contract. The tort claimed is intertwined in the contract and was not independent." The negligence claim failed as a matter of law.

See *The Netherlands Ins. Co. v. BSHM Architects, Inc., et al.*, 2018 WL 4441324 (Ohio App. 7 Dist. 2018).

MEMBER PROFILE:

FRANCISCO J. MATTA, ESQ.

HHCP Architects, Inc.
Orlando, FL

New TJS member Francisco Matta's first job out of architecture school was for a local firm in Puerto Rico which did a lot of residential and commercial developments. "It was much more about production and very little about design," he told us, "but a great real-world school for learning about dealing with clients, consultants, and government officials, as well as handling the permitting and approval processes." Francisco's first (and only) law job was with a small firm in San Juan, PR whose main client was the largest local surety company. "It was an enriching experience for two reasons," Francisco said, "first, given the client, about 85% of my litigation and contractual practice focused on construction and surety law; second, it reiterated my initial thoughts about wanting my law degree as a complement to my architectural background and not as my main career goal. After three years gaining an invaluable experience as a construction attorney, I was able to get a job in consulting and expert reporting and have loved it ever since."

Francisco is a graduate of the architecture program at Tulane University in New Orleans. "I always wanted to spend some time in The Big Easy and grew tired of the cold weather in the Northeast (undergrad at Northeastern University in Boston)," he said. For law school, however, he returned to his native Puerto Rico, where he attended the University of Puerto Rico. "I wanted to broaden my horizons given the state of the architecture profession and the construction industry as a whole at the time of the decision – this was early 2007 and the housing bubble had just burst. I decided to go to law school to expand my professional development, but always with the idea of remaining within the construction industry."

Halloween cops and robbers: Francisco, Margie, and daughters, Mariola and Carolina taking a selfie!

What intrigued him about combining the two studies? "I noticed that very little of my time was being devoted to design and production, while much more time had to be devoted to solving the less glamorous hurdles and challenges of the profession," he said, "especially, following up required permits, negotiating with government agencies and getting projects to move at a reasonable pace." While speaking to a friend of his who works as an environmental attorney, Francisco realized that he did similar tasks, especially in regard to handling government agencies and the building department. However, his "lawyer hat" afforded him a bit more authority and better results when dealing with government entities. "I figured that if I was going to have to devote so much time to these tasks, I might as follow that path. As my law school years went by, I met several people who exposed me to the potential for work in consulting and expert testimony. I enjoyed it so much that I decided to move in that direction."

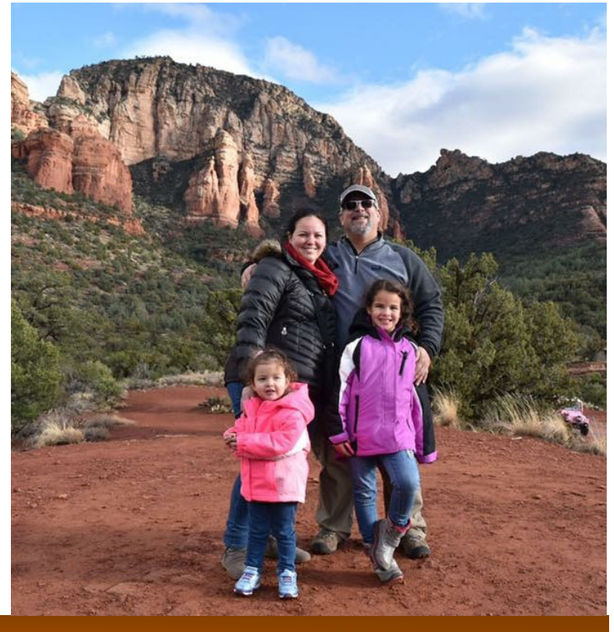
He currently serves as an Associate Vice President at HHCP Architects, Inc. in Orlando where he devotes most of his time to co-managing the CASE Division – a division within the firm devoted to providing construction analysis, support, and evaluation to attorneys, owners, design professionals, contractors, risk insurers and sureties engaged in dispute resolution efforts, as well as, other technical support services such as: peer reviews, ADA reviews, on-site investigations, and property condition assessments. "It is practically my dream job," he told us. "I get to work as a consultant and expert witness, while doing so in an architectural office setting which is cozier and less rigid than the corporate or legal environments of my prior jobs - all of this while being surrounded by a varied pool of talented people and great resources. I also get to practice some of the more traditional architectural work, which is something I have been missing recently."

(Below) Francisco Matta with his wife, Margie, and two daughters, Mariola (age 9) and Carolina (age 4), last Christmas.

Francisco is married to Margie, and they have two daughters, Mariola (9) and Carolina (4). Not surprising, most of his free time is devoted to spending time with his family. He follows professional sports, especially "fútbol" or football (don't call it soccer!). He also enjoys SCUBA diving, fishing, boating or anything else related to the sea.

The Matta family just recently moved to Orlando from Phoenix, so they are still getting to know their new city, especially the "non-touristy" side of it. "Its downtown is small but cozy, the people are friendly, and the city has a great ethnic mix. I think, as I assume many do, that it has great potential for growth and economic development." He likes being on the East coast, where he is now closer to family in Puerto Rico and in Europe.

Asked about his favorite architect, he chose Mónica Ponce de León, the current dean at Princeton, and Carlos Jiménez, tenured at Rice. "I had the privilege of having them as professors at different times in my career and absolutely love their approach to design. I also love the classical modernists, especially Aalto and Mies, and the always popular, but nonetheless magnificent, Frank Lloyd Wright." Advice for a young architect thinking of law school? "Make sure you're clear on the reasons for combining these two careers. They both require a lot of sacrifice, dedication and time."



Georgia: Court Caps Engineer's Liability for $30 Mil. Claim at $2.2 Mil. Under LOL Clause

This case involves a $30 million alleged professional liability on a $200 million ammonium nitrate plant. On Sept. 24, 2018, the federal trial judge granted the engineer's motion to enforce a limitation of liability ("LOL") provision and a waiver of consequential damages provision in the contract between the engineer, Weatherly, and the owner, US Nitrogen ("USN"). The net effect was that the LOL clause capped a potential $30 million claim at just $2.2 million. This is the most significant LOL decision in the State of Georgia.

The parties agreed that they were sophisticated businesses who engaged in arm's-length negotiations over the contract, and they had several individuals, including attorneys, review the contract before signing it. The project costs ran over budget and, after construction was complete, USN discovered cracks in the concrete foundations. USN sought advice from two other engineering firms, both of whom recommended that USN remove and redesign the entire plant foundation rather than simply make the repairs Weatherly had suggested. There were also alleged design defects in piping systems within the plant. USN sued Weatherly for breach of contract, professional negligence, negligent or fraudulent misrepresentation, bad faith, and breach of express warranty. Weatherly moved for partial summary judgment on the application of the LOL clause, which capped liability at 15% of the engineer's fee. In upholding the clause, the court noted that, "Georgia law recognizes the freedom of parties to contract, unless the contract is contrary to statute or public policy," and that, "Georgia, like many states, enforces limitation of damages provisions (sometimes called limitation of liability provisions) between sophisticated business persons . . . [even] for the consequences of his own negligence without contravening public policy . . . except when such an agreement is prohibited by statute."

The court noted that Georgia's an anti-indemnification statute, O.G.C.A. § 13-8-2(b), precludes some limitations of liability related to construction contracts, where damage is caused by the sole negligence of the indemnitee. The court stated that, "The agreement between Weatherly and USN represents a reasonable allocation of risk between these two sophisticated businesses. It poses no public safety, health, or welfare concerns as Weatherly remains liable to third parties for any negligence or misconduct. It is enforceable." In addition, the court found that, "Under Georgia law, to the extent that consequential damages are recoverable in breach of contract actions, a clause excluding such damages is valid and binding unless prohibited by statute or public policy." USN did not respond to Weatherly's motion on this issue, and there was no contention that the consequential damages waiver was somehow void. Therefore, the court found that the waiver of consequential damages was also enforceable. *US Nitrogen, LLC v. Weatherly, Inc.*, 2018 WL 4576053 (N.D.Ga. 2018).

Did You Know?

Did You Know . . . That As President, Thomas Jefferson doubled the size of the country?

Jefferson's greatest feat as the nation's third president (1801-1809), was the Louisiana Purchase, a transaction with France that effectively doubled the size of the United States. The deal took careful diplomacy, as Jefferson knew that France controlling the Mississippi River would have huge ramifications on trade movements. Fortunately, Frances's Napoleon Bonaparte was in the mood to deal, hoping the sale of the 830,000 square miles would help finance his armed advances on Europe. Bonaparte wanted $22 million; but he settled for $15 million. Jefferson was elated, though some critics alleged the Constitution didn't strictly allow for a president to purchase foreign soil.

Did You Know . . . That Thomas Jefferson Helped to Popularize Ice Cream in the U.S.?

Jefferson spent time in France in the 1700s as a diplomat (see pp. 8-9), and that is where he was likely introduced to the dessert delicacy known as ice cream. While the claim that Thomas Jefferson introduced ice cream to the U.S. is false, he can be credited with the first known recipe recorded by an American. Jefferson helped to popularize ice cream in this country when he served it at the President's House in Washington and his frequent serving of it during his time as president contributed to increased awareness. Jefferson was so fond of ice cream that he had special molds and tools imported from France to help his staff prepare it. Because there was no refrigeration at the time, the confections were typically kept in ice houses and brought out to the amusement of guests, who were surprised by a frozen dish during summer parties. He also left behind what may be the first ice cream recipe in America: six egg yolks, a half-pound of sugar, two bottles of cream, and one vanilla bean.

Did You Know . . . That Thomas Jefferson Had a Pet Mockingbird?

Even before the Revolution, Jefferson had taken a liking to mockingbirds, and he brought this affection to the White House, which they filled with melodious song. But he was singularly affectionate toward one mockingbird he named "Dick." The bird was allowed to roam Jefferson's office or perch on the president's shoulder. When Jefferson played his violin, Dick would accompany with vocals. Dick and his colleagues followed Jefferson back to Monticello when he was finished with his second term in 1809. Dick is unquestionably the "favorite" mockingbird whose cage was described as suspended among the roses and geraniums in the window recesses of the presidential cabinet. Jefferson cherished the favorite "with peculiar fondness, not only for its melodious powers, but for its uncommon intelligence and affectionate disposition, of which qualities he gave surprising instances. It was the constant companion of his solitary and studious hours. Whenever he was alone he opened the cage and let the bird fly about the room. After flitting for a while from one object to another, it would alight on his table and regale him with its sweetest notes, or perch on his shoulder and take its food from his lips. Often when he retired to his chamber it would hop up the stairs after him and while he took his siesta, would sit on his couch and pour forth its melodious strains." M. Smith, *The First Forty Years of Washington Society* (1906).

Did You Know . . . That Thomas Jefferson Died on July 4?

The third U.S. president, Thomas Jefferson, passed away on July 4, 1826. The second U.S. president, John Adams (term 1797 – 1801) also died on that same day, just five hours later.

JEFFERSON'S ICE CREAM RECIPE

2. bottles of good cream.
6. yolks of eggs.
1/2 lb. sugar

Mix the yolks & sugar put the cream on a fire in a casserole, first putting in a stick of Vanilla.

When near boiling take it off & pour it gently into the mixture of eggs & sugar. Stir it well.

Put it on the fire again stirring it thoroughly with a spoon to prevent it's sticking to the casserole. When near boiling take it off and strain it thro' a towel. Put it in the Sabottiere *[i.e., a mould, or small bucket]*

Then set it in ice an hour before it is to be served. put into the ice a handful of salt.

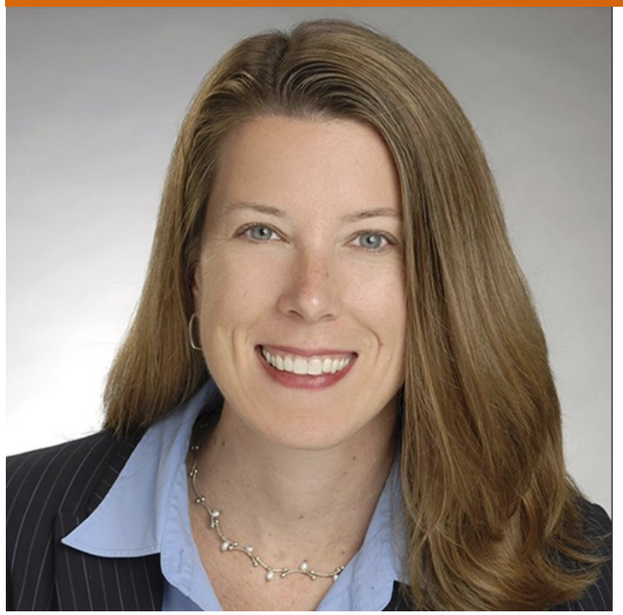
Put salt on the coverlid of the Sabotiere & cover the whole with ice. Leave it still half a quarter of an hour. Then turn the Sabottiere in the ice 10 minutes.

Open it to loosen with a spatula the ice from the inner sides of the Sabotiere.

Shut it & replace it in the ice.

Open it from time to time to detach the ice from the sides. When well taken (prise) stir it well with the Spatula. Put it in moulds, justling it well down on the knee. Then put the mould into the same bucket of ice. Leave it there to the moment of serving it.

To withdraw it, immerse the mould in warm water, turning it well till it will come out & turn it into a plate.



MEMBER PROFILE:

SHERI L. BONSTELLE, ESQ.

Jeffer Mangels Butler & Mitchell, LLP

Los Angeles, CA

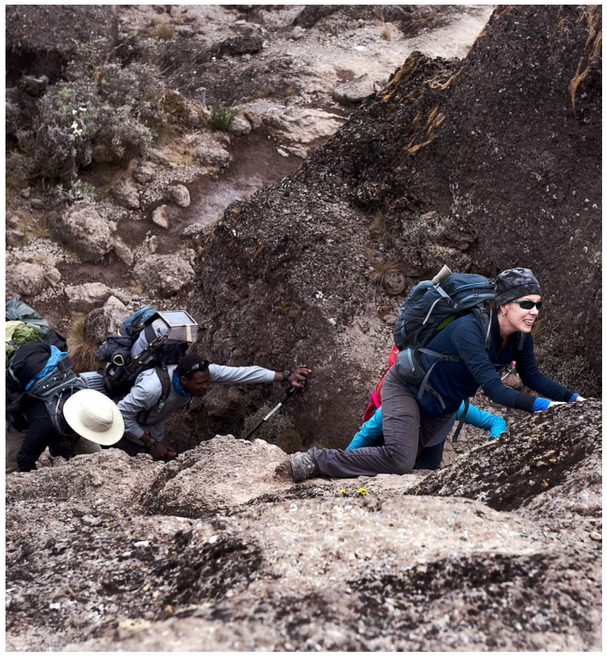
TJS Member Sheri Bonstelle is an adventurer, architect, lawyer and world traveler. Born in Cleveland, Ohio, it was a trip to New York City at age 14 that opened her eyes to a career in architecture. "When I returned to Ohio from a mother/daughter trip to New York City, I was certain of two things," she said. "One, I wanted to be an architect, and two, I had to live in New York. I spent the next four years getting there." Sheri enrolled in the architecture program at Columbia University, where she obtained both a bachelors and masters in architecture. "While pursuing my degrees I discovered another passion – international travel. After freshman year, I backpacked across Europe with a sketchbook in hand, and decided that the best way to learn about architecture was to experience it in person. I spent a semester studying in Zurich, and every weekend or break, I would travel to other countries to discover the world's greatest architects – Alvar Aalto in Oslo, Le Corbusier in Paris, Adolf Loos in Prague." After graduation, Sheri worked at Obayashi Corp. in Tokyo, Japan, and became enamored with both traditional Japanese structures and the expressive zoning - free buildings of the younger Japanese architects.

Armed with her worldly experiences, Sheri returned home to the U.S. to begin her architecture career in the middle of the 1990's economic recession. "For my first job, I drew stairs, handrails and tile designs, by hand, for schematic drawings of the Union Square subway station. I then obtained a post-graduate grant, and spent my summer backpacking across India and China, while documenting underground Chinese dwellings near Xian. I then decided to gain as much experience as possible in construction and worked for a design-build firm that did fast-track adaptive reuse of office buildings into residential structures."

Finally, Sheri ended up at Jambhekar Strauss, a planning and architecture firm that focused on public works projects, where she spent several years designing stations for the Hudson Bergen light rail line, among other projects. It was then that her career took a right turn, into law. "After a discussion with a developer and attorney, I decided to attend law school to provide the tools to pursue my own career in development." Sheri enrolled at Fordham University School of Law in Manhattan. After graduation, she began her legal career as an associate with the New York City law firm of Strook & Strook & Lavan, LLP, where she spent three years. "My first day of work as a real estate attorney at Stroock was the week following 9-11. The firm represented Silverstein Properties, the ground lessor of the World Trade Center and, as a result, the first few years of my practice were significantly affected by that tragic event." She moved to Los Angeles in 2004, where Sheri discovered a new obsession – 1950's modernist architecture. "I now spend my weekends attending architecture tours, running by Richard Neutra houses in Silverlake, and biking along amazing beachfront structures." After that cross-country move to LA, she landed at the Allen Matkins law firm, where she spent one year. For the past 13 years, Sheri has worked for the 120-person Jeffer Mangels Butler & Mitchell LLP law firm in LA, where she is a partner in the firm's land use department.

"My work colleagues have varied graduate degrees and experiences that provide a depth of knowledge that complements my own history. My favorite type of project is when a client shows me a piece of land and asks, 'What should I do with it?' After 25 years of practice in both architecture and law, I have the skills to represent them in buying, entitling, litigating and constructing a development. And, I enjoy it," Sheri told us. Sheri's article *"Climbing Mount Kilimanjaro – My Trek to the Roof of Africa,"* was published in the April 2018 issue of *Monticello*.

(Left and below) Team JMBM conquers Mount Kilimanjaro in Tanzania – known as the "Roof of Africa" – in Feb. 2018, reaching Uhuru Peak at 19,341 feet. Shown here are Rachel Capoccia, Shari Bonstelle, and Maurice Oketch. The three spent 8 months conditioning before the trip hiking peaks in Southern California, including Mt. Baldy and Muir Peak.



MINUTES OF THE BOARD MEETING

October 15, 2018 (Noon EST)

Invited Attendees:

Directors: Suzanne Harness (President), Donna Hunt (VP/ President-Elect), Jose Rodriguez (Treasurer) (absent), Chuck Heuer, Jeffrey Hamlett, Rebecca McWilliams (absent), Jacqueline Pons-Bunney (absent), Mark Ryan, Joshua Flowers. Secretary: Joyce Raspa. Founders: Tim Twomey (absent), Craig Williams, and Bill Quatman.

President Harness called the meeting to order and welcomed the two new Directors, Mark Ryan and Joshua Flowers, each of whom gave a brief introduction of himself.

Treasurer's Report:

Jose Rodriguez, Treasurer, prepared the following report submitted prior to the meeting. The account balance is currently $16,036.61. There is one pending check to Kenton Quatman in the amount of $250.00, for web services. There are no other outstanding invoices. Once the check is cashed, the bank balance will be $15,786.61.

2018 Dues Update:

99 members have paid their 2018 membership dues. The following members have not yet paid for 2018:

1. Lawrence E. Kritenbrink;
2. Peggy Landry;
3. Barry Miller;
4. Theresa Ringle; and,
5. Mark Stockman.

The following member has not paid for 2017 and 2018:

1. Deborah Mastin.

The following two members have not paid for 2016, 2017, and 2018:

1. Casius Pealer; and
2. Joseph E. Flynn

Donna Hunt recommended that letters be sent to the two members who have not paid their dues for 2016, 2017 and 2018, Casius Pealer and Joseph E Flynn, welcoming them to become current on their dues to remain as members, but if not, then removing them from the TJS Member list. Additionally, Suzanne reported that the introduction of online payments was being investigated by the Treasurer and was anticipated to be ready in 2019.

> "Above all things, and at all times, practice yourself in good humor. This, of all human qualities, is the most amiable and endearing to society. Whenever you feel a warmth of temper rising, check it at once, and suppress it, recollecting it will make you unhappy within yourself, and disliked by others. Nothing gives one person so great advantage over another, as to remain always cool and unruffled under all circumstances. Think of these things, practice them & you will be rewarded by the love & confidence of the world."
> *-Thomas Jefferson to Francis Eppes, Monticello, May 21, 1816*

Annual Meeting Report. Suzanne Harness, President, noted that the Annual Meeting Minutes were posted in the July 2018 issue of *Monticello.*

Old Business:

AIA Convention Education Program: Chuck Heuer reported that he was notified that the AIA Education program was not selected for the 2019 AIA Convention. He will pick up on completing the half-day workshop application which is due the end of October. Josh Flowers offered assistance and suggestions, such as AIA looking for participant engagement and adding details in the "Program Delivery" section which has unlimited word count. Craig Williams reported that he and Tim Twomey will be on a program presenting on Risk Management at the 2019 AIA Convention, specifically on Condominium Liability. Suzanne Harness stated that they should post a notice in the January issue of *Monticello* to publicize the presentation by TJS members.

Member Survey:

Jeffrey Hamlett and Donna Hunt will follow up with Mehrdad Farivar to find out where he left off on developing a member survey. Suzanne Harness suggested that a ten question survey is the objective.

Proposed Changes to By-laws:

Chuck Heuer and Jeff Hamlett volunteered to continue updating the Bylaws on the following subjects:

- Eliminating the Dual Licensure requirement for Directors,
- Timing of the required annual Board Meeting (immediately after the Annual Meeting),
- Election of Officers by the Board following the Annual Meeting,
- Elimination of the $2 bill initial dues requirement, and,
- Adding an Honorary Membership category.

Web Site:

Suzanne Harness will follow up with Alex Van Galen, who volunteered at the Annual Meeting to help us update the website. Tasks include:

- Post Membership Application;
- Make site more easily modifiable with a content management system.

The Board discussed whether to have a members-only portion of the website, but to continue posting *Monticello* to the public because it can serve as an education and recruiting tool. The bylaws state that the Membership Directory be published for the private use of the members, but we post it publicly as well, without telephone numbers.

Email List Serve as Member Benefit: Suzanne Harness will discuss this with Mr. Van Galen.

New Business:

Next SCOTUS Admission: Donna Hunt reported that she has been working with volunteers Jessica Henderson and Jessica Hardy to establish the next Supreme Court admission date, preparations, and notice to the TJS membership to determine the number of people interested. Donna will further report in January.

2019 Annual Meeting:

The annual meeting will be held on Wednesday, June 5, 2019, in Las Vegas Nevada.

- New schedule: Gather at 5:30 p.m. Meeting for Members 6:00-7:00 p.m. Cocktails and dinner afterwards, which will be open to member guests.
- Mark Ryan volunteered to lead the event preparations. Joyce Raspa volunteered to assist and will promptly send information to Mark so a location may be secured as soon as possible.

Other New Business:

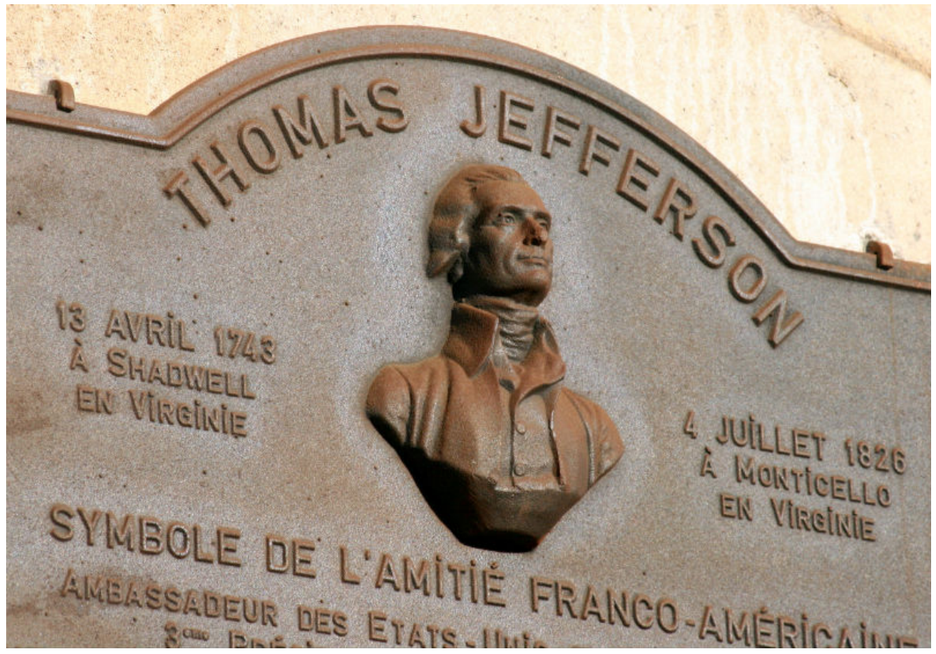
Bill Quatman reported that five individuals had contacted him via email expressing an interest in joining TJS. The potential members had each been sent a membership application. He asked for a volunteer to follow-up with each of them. Suzanne Harness stated that membership issues are part of the Secretary's responsibilities, and Joyce Raspa volunteered to follow up with the potential members. Joyce suggested that a Membership Chair Person position be established to handle membership issues and new member outreach. [Note: the TJS Bylaws allow for a Membership Committee, but we have never established one].

Next Board Meeting:

Early January 2019: Joyce Raspa, Secretary, will set up the meeting date and time in early December.

There being no further business to discuss, upon motion duly made and seconded, the board meeting was adjourned at 12:50 p.m., EST.

Submitted by: Joyce Raspa, Secretary.



This plaque in Montpellier, France is a tribute to Thomas Jefferson, U.S. Ambassador (Minister) to France, and the Franco-American relationship